

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Document #

33

RICHARD ROSARIO

-v-

ROBERT ERIOLE, SUPERINTENDENT OF
GREEN HAVEN CORRECTIONAL FACILITY

USCA NO. 08-5521-pr

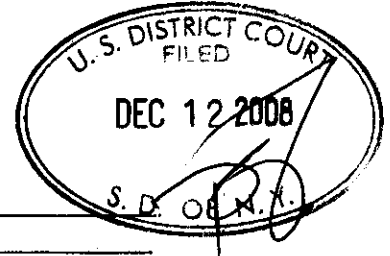
SDNY NO. 05-cv-8072

JUDGE: P. Kevin Castel

DATE: 12/12/08

INDEX TO THE RECORD ON APPEAL

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DISTRICT COURT DOCKET ENTRIES

DOCUMENTS

DOC#

Clerk's Certificate

See Attached List of Numbered Documents

☒ Original Record

☐ Supplemental Record

The record in the above entitled case was indexed to the U.S.C.A.
for the Second Circuit on the 12th Day of DECEMBER, 2008.

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

RICHARD ROSARIO

-v-
ROBERT ERCOLE, SUPERINTENDENT OF
GREEN HAVEN CORRECTIONAL FACILITY

U.S.C.A. # 08-5521-pr

U.S.D.C. # 05-cv-8072

JUDGE: P. KEVIN CASTEL

DATE: 12/12/08

Clerk's Certificate

I, J. Michael McMahon, Clerk of the Court of the United States District Court for the Southern District of New York, do hereby certify that the certified copy of the docket entries and the original filed papers numbered 1 Through 32, inclusive, constitutes the Original record on appeal in the above entitled proceedings except for the following missing documents:

<u>Date Filed</u>	<u>Document Description</u>
<u>5/9/06</u>	<u>DECLARATION OF JODI K. MILLER IN SUPPORT OF THE REPLY</u>
	<u>MEMORANDUM OF LAW IN SUPPORT OF PETITION FOR</u>
	<u>WRIT OF HABEAS CORPUS</u>

In Testimony Whereof, I have caused the seal of said Court to be hereunto affixed, at the City of New York, this 12th Day of DECEMBER In this year of our Lord, Two Thousand and Eight, and the Independence of the United States this 233RD year.

J. Michael McMahon, Clerk

By


Deputy Clerk

APPEAL, CASREF, CLOSED, HABEAS

U.S. District Court
United States District Court for the Southern District of New York (Foley Square)
CIVIL DOCKET FOR CASE #: 1:05-cv-08072-PKC-HBP
Internal Use Only

Rosario v. Ercole et al
Assigned to: Judge P. Kevin Castel
Referred to: Magistrate Judge Henry B. Pitman
Cause: 28:2254 Ptn for Writ of H/C - Stay of Execution

Date Filed: 09/16/2005
Date Terminated: 10/23/2008
Jury Demand: None
Nature of Suit: 530 Habeas Corpus (General)
Jurisdiction: Federal Question

Date Filed	#	Docket Text
09/16/2005	<u>1</u>	PETITION FOR WRIT OF HABEAS CORPUS pursuant to 28 U.S.C. 2254. (Filing Fee \$ 5.00, Receipt Number 555605). Document filed by Richard Rosario.(jeh,) (Entered: 09/20/2005)
09/16/2005		Magistrate Judge Henry B. Pitman is so designated. (jeh,) (Entered: 09/20/2005)
09/23/2005	<u>2</u>	ORDER the Clerk of Court shall serve a copy of this Order and Petition, by certified mail, upon the Attorney General of the State of New York and the District Attorney of Bronx County, and shall also send a copy of this Order, by certified mail, upon Richard Rosario. Respondent shall file an answer or motion herein within sixty (60) days from the date of this Order. (Signed by Judge P. Kevin Castel on 9/22/2005) (tve,) (Entered: 09/28/2005)
09/28/2005		Mailed a copy of 2 Order to Answer, to Richard Rosario c/o Carl Hanline Loewenson Jr. by Certified Mail # 7004 2510 0001 4687 3118 with Return Receipt Requested. (tve,) (Entered: 09/28/2005)
09/28/2005		Mailed a copy of 1 Petition for Writ of Habeas Corpus, 2 Order to Answer, to the Attorney General of the State of New York by Certified Mail # 7004 2510 0001 4687 3125 with Return Receipt Requested. (tve,) (Entered: 09/28/2005)
09/28/2005		Mailed a copy of 1 Petition for Writ of Habeas Corpus, 2 Order to Answer, to the District Attorney of Bronx County by Certified Mail # 7004 2510 0001 4687 3132 with Return Receipt Requested. (tve,) (Entered: 09/28/2005)
10/05/2005		Received Return Receipt of 1 Petition for Writ of Habeas Corpus, 2 Order to Answer, as to the Attorney General of the State of NY, which was served by Certified Mail # 7004 2510 0001 4687 3125, on 9/30/05. (lma,) (Entered: 10/05/2005)
10/05/2005		Received returned mail re: 2 Order to Answer,. Mail was addressed to Richard Rosario of c/o Carol Hanline Loewenson, Jr. at 1290 Avenue of the Americas, New York, NY 10104 and was returned for the following reason(s): attempted - not known. (tve,) (Entered: 10/12/2005)
10/12/2005		Received Return Receipt of 1 Petition for Writ of Habeas Corpus, 2 Order to Answer, as to the District Attorney, Bronx County, which was served by Certified Mail # 7004 2510 0001 4687 3132, on 10/3/05. (lma,) (Entered: 10/12/2005)
11/10/2005	<u>3</u>	STIPULATION AND SCHEDULING ORDER: The parties in this action have conferred and have agreed upon briefing schedule that extends beyond the deadline set forth in the Courts September 22, 2005 order: Petitioners memorandum of law in support of the petition for writ of Habeas corpus due by 12/16/05. Respondents memorandum of law in opposition to the Petition for a writ of Habeas Corpus due within 60 days of service. Petitioners reply memorandum of law in further support of the petition for writ of Habeas Corpus due within 30 days of service. So Ordered. (Signed by Judge P. Kevin Castel on 11/10/05) (js,) (Entered: 11/14/2005)
12/16/2005	<u>4</u>	MEMORANDUM OF LAW in Support re: 1 Petition for Writ of Habeas Corpus. Document filed by Richard Rosario. Received in night deposit box on 12/16/05 at 10:51 p.m. (db,) (Entered: 12/20/2005)
12/16/2005	<u>5</u>	DECLARATION of Jodi K. Miller in Support re: 1 Petition for Writ of Habeas Corpus. Received in night deposit box on 12/16/05 at 10:51 p.m. Document filed by Richard Rosario. (db,) (Entered: 12/20/2005)
12/16/2005	<u>6</u>	APPENDIX I of IV to the 5 Declaration of Jodi K. Miller (Post-Conviction Hearing Exhibits). Document filed by Richard Rosario. Received in night deposit box on 12/16/05 at 10:51 p.m. (db,) (Entered: 12/20/2005)
12/16/2005	<u>7</u>	APPENDIX II of IV to the 5 Declaration of Jodi K. Miller (Post-Conviction Hearing Exhibits). Document filed by Richard Rosario. Received in night deposit box on 12/16/05 at 10:52 p.m. (db,) (Entered: 12/20/2005)
12/16/2005	<u>8</u>	APPENDIX III of IV to the 5 Declaration of Jodi K. Miller (Post-Conviction Hearing Exhibits). Document filed by Richard Rosario. Received in night deposit box on 12/16/05 at 10:53 p.m. (db,) (Entered: 12/20/2005)
12/16/2005	<u>9</u>	APPENDIX IV of IV to the 5 Declaration of Jodi K. Miller (Post-Conviction Hearing Exhibits). Document filed by Richard Rosario. Received in night deposit box on 12/16/05 at 10:53 p.m. (db,) (Entered: 12/20/2005)
12/29/2005	<u>10</u>	ORDER REFERRING CASE TO MAGISTRATE JUDGE. Order that case be referred to the Clerk of Court for assignment to a Magistrate Judge for Habeas Corpus. Referred to Magistrate Judge Henry B. Pitman. (Signed by Judge P. Kevin Castel on 12/27/2005) Copies Mailed By Chambers.(lb,) (Entered: 12/30/2005)
02/17/2006	<u>11</u>	ENDORSED LETTER addressed to Magistrate Judge Henry B. Pitman from Christopher John Blira-Koessler dated 2/10/2006 re: to request a 30-day extension until March 16,2006 to complete our response. Responses due by 3/16/2006 ENDORSEMENT: Application Granted. (Signed by Judge Henry B. Pitman on 2/10/2006) (jmi,) (Entered: 02/21/2006)
03/16/2006	<u>12</u>	AFFIDAVIT of Christopher J. Blira-Koessler in Opposition re: 1 Petition for Writ of Habeas Corpus. (jco,) (Entered: 03/17/2006)
03/17/2006	<u>13</u>	ENDORSED LETTER addressed to Judge Pitman from Christopher J. Blira-Koessler dated 3/15/06: granting respondents request to file a Memo in excess of the Court's limit of 25 pages. (Signed by Judge Henry B. Pitman on 3/15/06) (cd,) (Entered: 03/20/2006)
04/17/2006	<u>14</u>	ENDORSED LETTER addressed to Judge Henry B. Pitman from Carl H. Loewenson dated 4/4/06 re: Request a three week extension to submit Mr. Rosario's reply papers.ENDORSEMENT: Application GRANTED. (Signed by Judge Henry B. Pitman on 4/5/06) (js,) (Entered: 04/17/2006)

See #15

04/17/2006	15	ENDORSED LETTER addressed to Judge Henry B. Pitman from Carl H. Loewenson dated 4/4/06 re: Request permission to submit Mr. Rosario's reply memorandum of law in support of his petition on or before May 8, 2006 Mr. Rosario's reply memorandum is presently due on April 17, 2006. ENDORSEMENT: Application GRANTED. (Signed by Judge Henry B. Pitman on 4/5/06) (js,) (Entered: 04/18/2006)
05/08/2006	16	DECLARATION of Jodi K. Miller in Support of the Reply Memorandum of of Law in Support of Petition for Writ of Habeas Corpus. Document filed by Richard Rosario. (dj,) (Entered: 05/09/2006)
05/08/2006	17	REPLY MEMORANDUM OF LAW in Support re: 1 Petition for Writ of Habeas Corpus. Document filed by Richard Rosario. (dj,) (Entered: 05/09/2006)
12/28/2007	18	REPORT AND RECOMMENDATIONS: For reasons further set forth in said R&R. I recommend that petitioner's 1 Petition for Writ of Habeas Corpus be granted with respect to his claim that the prosecutor's use of peremptory challenges established a prima facie case of racial discrimination unless 90 days of final resolution of this proceeding, the New York State courts conduct a reconstruction hearing and conclude that race did not play a role in the prosecution's exercise of its peremptory challenges. I recommend that the habeas petition be denied with respect to petitioner's claims that (1) he received ineffective assistance of counsel, (2) the Trial Court erred in allowing the prosecutor to introduce extrinsic evidence of his Florida incarceration, and (3) the evidence demonstrates he is actually innocent of the crime. Since petitioner HAS made a substantial showing of the denial of a constitutional right with respect to his claim of ineffective-assistance, I also recommend that a certificate of appealability be issued for that claim but that no certificate of appealability be issued for his evidentiary and actual innocence claims. 28 USC 2253. Objections to R&R due by 1/12/2008 (Signed by Magistrate Judge Henry B. Pitman on 12/28/07) Copies Mailed by Chambers.(db) (Entered: 01/02/2008)
01/07/2008	19	ENDORSED LETTER addressed to Judge P. Kevin Castel from Carl H. Loewenson, Jr. dated 1/4/08 re: The parties jointly request that the deadline for submitting objections to the Report and Recommendation be extended from 1/16/08, to 2/5/08. The parties further request that the ten-day period for submitting responses to any objections submitted on 2/5/08, be extended by one week from 1/19/08, to 2/26/08. ENDORSEMENT: The jointly proposed schedule is adopted. (Objections to R&R due by 2/5/2008, Responses due by 2/26/2008) (Signed by Judge P. Kevin Castel on 1/4/08) Copies Mailed By Chambers. (tro) (Entered: 01/09/2008)
01/15/2008	20	ORDER TO GRANT TELEPHONIC CONFERENCE BETWEEN RICHARD ROASARIO, PETITIONER FOR WRIT OF HABEAS CORPUS, AND HIS COUNSEL, that Petitioner and his counsel will hold a telephonic conference on 1/22/08 at 10am to discuss Magistrate Judge Pitman's Report and Recommendation and strategy in light of the Report and Recommendation subject to the reasonable requirements of the institution. A representative from the Five Points Correctional Facility will contact petitioner's counsel Lily Fan, Esq. of Morrison & Foerster LLP at (212) 336-4177 by close of business on Friday, 1/18/08, with the telephone number where petitioner can be reached on the above-ordered date and time. (Telephone Conference set for 1/22/2008 at 10:00 AM before Judge P. Kevin Castel.) (Signed by Judge P. Kevin Castel on 1/15/08) (tro) (Entered: 01/15/2008)
02/05/2008	22	OBJECTION to the Magistrate's 18 Report and Recommendation. Document filed by Robert Ercole. (rw) (Entered: 02/07/2008)
02/05/2008	23	Petitioner's Objections to the Magistrate Judge's 18 Report and Recommendation. Document filed by Richard Rosario. (rw) (Entered: 02/07/2008)
02/05/2008	24	DECLARATION of JODI K. MILLER re: 23 Objection to Report and Recommendation. Document filed by Richard Rosario. (rw) (Entered: 02/07/2008)
02/06/2008	21	ORDER that Petitioner and his counsel will hold a telephonic conference on FRIDAY, FEBRUARY 15, 2008 at 10 a.m. to discuss his strategy concerning the Habeas petition subject to the reasonable requirements of the institution; it is also ORDERED that a representative from the Five Points Correctional Facility will contact petitioner's counsel Lily Fan, Esq. of Morrison & Foerster LLP at (212) 336-4177 by close of business on TUESDAY, FEBRUARY 12, 2008, with the telephone number where petitioner can be reached on the above-ordered date and time. SO ORDERED. (Telephone Conference set for 2/15/2008 at 10:00 AM before Judge P. Kevin Castel.) (Signed by Judge P. Kevin Castel on 2/6/2008) (jmi) (Entered: 02/07/2008)
02/20/2008	25	ORDER TO GRANT TELEPHONIC CONFERENCE BETWEEN RICHARD ROASARIO, PETITIONER FOR WRIT OF HABEAS CORPUS, AND HIS COUNSEL: that Petitioner and his counsel will hold a telephonic conference on Monday, 2/25/08 at 11:00 a.m. to discuss his strategy concerning the Habeas petition subject to the reasonable requirements of the institution. The Five Point Correctional Facility will provide the Petitioner with a handset to the phone and a secure phone line where his communication with his counsel can remain privileged and confidential; subject to any facility or DOCS established policy on allowing client communications. A representative from the Five Points Correctional Facility will contact petitioner's counsel Lily Fan, Esq. of Morrison & Foerster, LLP at (212) 336-4177 by close of business on Friday, 2/22/08, with a telephone number where petitioner can be reached on the above-ordered date and time. (Signed by Judge P. Kevin Castel on 2/19/08) (tro) (Entered: 02/20/2008)
02/26/2008	26	ENDORSED LETTER addressed to Judge P. Kevin Castel from Christopher John Blira-Koessler dated 2/25/08 re: Counsel writes to request an extension of time until 3/4/08 to file a reply to the objections filed by petitioner to the Report and Recommendation. ENDORSEMENT: Application granted. So Ordered. (Replies due by 3/4/2008.) (Signed by Judge P. Kevin Castel on 2/25/08) (jco) (Entered: 02/26/2008)
03/04/2008	27	RESPONSES to Respondents' Objections to the Magistrate Judge's Report and Recommendation. Document filed by Richard Rosario. (dj,) (Entered: 03/06/2008)
03/04/2008	28	AFFIDAVIT of Christopher J. Blira-Koessler in Reply to Petitioner's Objections to the Magistrate's Report and Recommendation. Document filed by Robert Ercole, Eliot Spitzer. (dj,) (Entered: 03/07/2008)
07/22/2008	29	NOTICE OF CHANGE OF ADDRESS by Jin Hee Lee on behalf of Richard Rosario. New Address: NAACP Legal Defense and Educational Fund, Inc., 99 Hudson Street, Suite 1600, New York, NY, USA 10026, 212-965-2283. (Lee, Jin Hee) (Entered: 07/22/2008)
10/22/2008	30	MEMORANDUM AND ORDER: The R & R is modified to the extent that it recommends granting the petitioner relief on his Batson claim. It is adopted in all other respects. The petition is dismissed. Petitioner has not made a substantial showing of the denial of a constitutional right, and, accordingly, a certificate of appealability will not issue, 28 U.S.C. § 2253. SO ORDERED. (Signed by Judge P. Kevin Castel on 10/22/2008) (tve) (Entered: 10/22/2008)
10/22/2008		Transmission to Judgments and Orders Clerk. Transmitted re: 30 Order Adopting Report and Recommendations, to the Judgments and Orders Clerk. (tve) (Entered: 10/22/2008)
10/23/2008	31	CLERK'S JUDGMENT That for the reasons stated in the Court's Memorandum and Order dated October 22, 2008, the report is modified to the extent that it conditionally recommends granting the petitioners Batson claim; the report is adopted in all other respects; and the petition is dismissed; the Court finds that because petitioner has not made a substantial showing of the denial of a

		constitutional right, a certificate of appealability will not issue. (Signed by J. Michael McMahon, clerk on 10/23/08) (Attachments: # 1 notice of right to appeal)(ml) (Entered: 10/23/2008)
10/23/2008		Mailed notice of Right to Appeal to Attorney(s) of Record: Jin Hee Lee, Carl Hanline Loewenson, Jr, Jodi Kim Miller. (mro) (Entered: 10/24/2008)
11/14/2008	32	NOTICE OF APPEAL from 31 Clerk's Judgment, 30 Order Adopting Report and Recommendations. Document filed by Richard Rosario. Filing fee \$ 455.00, receipt number E 669254. Copies mailed to attorney(s) of record: District Attorney, Bronx County. (tp) (Entered: 11/14/2008)
11/14/2008		Transmission of Notice of Appeal and Certified Copy of Docket Sheet to US Court of Appeals re: 32 Notice of Appeal,. (tp) (Entered: 11/14/2008)
11/14/2008		Transmission of Notice of Appeal to the District Judge re: 32 Notice of Appeal,. (tp) (Entered: 11/14/2008)